

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 21990

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TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

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On Petition for Review of Orders of the  
Federal Communications Commission

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SUPPLEMENTAL BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

This review was submitted to the Court on November 10, 1967, but held in abeyance pending the Supreme Court's decision in United States v. Southwestern Cable Co.,



392 U.S. \_\_\_, 36 LW 4553 (No. 363, June 10, 1968). By order of the Court of June 24, 1968, leave was granted for supplemental briefs to discuss the impact on the pending review of the Supreme Court's decisions in both United States v. Southwestern Cable Co., 392 U.S. \_\_\_, 36 LW 4553 (No. 363, June 10, 1968) and Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. \_\_\_, 36 LW 4656 (No. 618, June 17, 1968). We review these decisions here.

#### ARGUMENT

##### I

In United States v. Southwestern Cable Co., supra., the Supreme Court squarely upheld the jurisdiction of the Federal Communications Commission to regulate CATV, whether off-the-air or microwave fed, under the Commission's plenary power to regulate communications by wire or radio. But in its broad jurisdictional affirmance the Court stressed that it was not passing upon or examining the CATV rules promulgated under this power (Id., at 4556):





We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court.

Nor did the Court outline the limits or extent of the Commission's regulatory power over CATV. (Id., at 4559):

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law", as "public convenience, interest or necessity requires". 47 U.S.C. §303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

Thus, the issues before this Court in the instant review challenging the Commission's jurisdiction over CATV (Argument, part I) are moot. Remaining, however, are the specific challenges of the validity of the non-duplication rule, 47 C.F.R. §74.1103 (Argument, part II) and the absence of guarantees in the rules to provide for an evidentiary hearing before curtailing existing service under



Section 74.1109 of the rules (part II B and III). These challenges raise constitutional questions not before the Supreme Court, but raised here.<sup>1/</sup> We examine below the Court's decision in the two cases insofar as they bear upon the constitutional questions at issue here.

## II

The carriage and non-duplication rule, Section 74.1103, provides for carriage of local signals and same-day non-duplication of the local signals by distant signals also carried by the CATV system. We argue in Part II of our Brief that the Commission's order of non-duplication imposes a prior restraint upon the reception and distribution of information in violation of free speech guarantees of the First Amendment. Language in the Supreme Court's recent decisions confirms our factual analysis of the type of service provided by the CATV system. Broadcasting contents are "a principal source of information and entertainment" Southwestern, supra, at 4559. Television viewing is achieved by both broadcaster who transmits signals and viewers, who "by means of television sets and antennas that they themselves

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In its conclusion the Supreme Court observed (Id., at 4560): "And there is no claim that its [the Commission's] procedure in this respect is in any way constitutionally infirm."



provide, receive the broadcasting signals and reconvert them into the visible images and audible sounds of the program." Fortnightly, supra, at 4658. The service provided by CATV in television is ordinarily a "simultaneous retransmission of communications" in a stream that is "essentially uninterrupted and properly indivisible." Southwestern, supra, at 4557.

Both decisions by the supreme Court recognize CATV operation as essentially receipt and distribution of program materials. Insofar as a "performance" under the Copyright Act is concerned, Fortnightly held that the CATV service more closely resembles the viewer's role than the broadcaster's (Id., at 4655-4659):

Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry. [Emphasis added.]

Of course, the essential function of CATV service of "receipt" and "distribution" is acknowledged by the rules themselves in the definition of CATV, §74.1101, and in

The first part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language in its present state. The second part of the paper discusses the development of the English language from its earliest forms to the present day. It is shown that the English language has undergone a process of continuous change, and that this change has been influenced by a variety of factors, including contact with other languages, internal changes, and the influence of social and cultural factors. The third part of the paper discusses the role of the English language in the world today. It is argued that the English language has become a global language, and that it plays a central role in international communication and trade. The fourth part of the paper discusses the future of the English language. It is suggested that the English language will continue to evolve, and that it will remain an important language in the world for many years to come.



the caption of the carriage and non-duplication rule, §74.1103: "Requirement relating to distribution of television signals by community antenna television systems." [Emphasis added.] Thus, if our analysis in part II A of our Brief is correct that the constitutional protection of free speech includes the right to distribute and the right to receive, the CATV receipt and distribution of broadcast signals is squarely within the First Amendment protection.

The Commission has argued that "reasonable regulation of the use of the radio spectrum has been held not in violation of free speech under the First Amendment in National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943) (Government Brief, part III, p. 43). But the Supreme Court in Fortnightly has held the CATV service more closely akin to the viewers' function than the broadcasters', and thus the analogy to broadcasting regulation fails. Moreover, CATV in receipt and distribution makes no use of "spectrum space" and the underpinning of reasonable regulation similarly fails. In preserving scarce spectrum space the Commission through its licensing actually promotes the exercise of free speech, since if everyone were to broadcast no one could be heard. Commission reliance on NBC,





supra, as authority for prior restraint of CATV carriage is misplaced, since CATV service occupies no spectrum space. Unlike the broadcast licensing rules, the non-duplication rules do not promote free speech and are unreasonable.  
2/

Indisputably same-day non-duplication limits and restricts access to available information and materials provided by the broadcaster. We concede that simultaneous non-duplication limits only the available source or channel of program materials. But same-day duplication protection, as required by the rules, directly restricts the availability and the viewer's choice of program materials. For example, when two nationally attractive network shows are simultaneously pitted against each other, the viewer cannot witness both. However, if CATV carriage brings these programs from a different time zone or merely different time

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2/  
However, the Tenth Circuit in a recent opinion has held non-duplication protection is reasonable regulation and not in violation of the First Amendment. Conley Electronics Corp. v. F.C.C., \_\_\_ F.2d \_\_\_, 12 R.R.2d 2108 (1968). We feel that the Tenth Circuit failed to distinguish the basis for regulation between broadcasting and CATV, and is therefore in error. The Tenth Circuit has been asked to stay its mandate pending a filing of a petition for certiorari.



of scheduled broadcast from a nearby station within the same time zone, the viewer's access to information and materials is widened. Additionally, the viewer's own convenience or availability may be at one broadcast time and not the other. Or, he may wish to watch the same program twice. In each of these instances, the Commission's rule restricts his right to receive and the CATV systems' right to distribute, and thus constitutes a prior restraint upon the flow of information.

The Commission has repeatedly stated that the Communications Act does not permit it to limit or select program sources or materials. Indeed, the act expressly prohibits this function under 47 U.S.C §326, the censorship provision. Most recently the Commission in official action advised the National Commission on the Cause and Prevention of Violence that the Commission was reluctant to undertake studies on the causal connection between violence and broadcast materials "because we are the licensing agency for the stations involved and are hesitant about encroaching on their freedom of program choice." FCC 68-622, Mimeo No. 16828, dated June 12, 1968. If the Commission is powerless



to limit the broadcasters' "freedom of program choice" then a fortiori it is powerless to limit the choice of available materials broadcasted to members of the viewing public, or the right of the CATV system to carry the available signals.

The only exercise of review over television program materials by the Commission has been through grant or renewal of licenses in comparing the service offered by competing broadcast applicants. Denial of an application for a license for a radio station under this accepted system of licensing, has been held to be no impairment of First Amendment freedom. However, there is no precedent supporting FCC's proscription of distribution of communications over closed-circuit cable facilities for which no federal license is required. And the FCC cannot lawfully condition the public's guaranteed access to broadcast materials upon relinquishment of the constitutional right to distribute or receive free of governmental restraint.

Southwestern and Fortnightly properly characterize CATV service as essentially reception and distribution of available broadcast signals. Moreover, Fortnightly



permits use of the available material free of any copy-right infringement. More important than access to copy-right material is the protection of freedom of speech and the access to available information and materials. Same-day non-duplication protection infringes upon this right.

### III

We urged in Part II B and III of our Brief that the Commission's summary order limiting and curtailing an existing service violates the due process clause of the Fifth Amendment and is in conflict with pertinent statutes and regulations. In support of this contention we cited this Court's opinion in Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir., 1967). In reversing this Court's opinion, the Supreme Court noted that there is no claim that the Commission's "procedure in this respect is in any way constitutionally infirm." United States v. Southwestern Cable Co. 392 U S. \_\_\_, 36 LW 4554, at 4560 (No. 363, June 10, 1968). Further, the Court in upholding the Commission's summary procedure in freezing service, held that Section 312 of the Communications Act, the cease and desist provision, did not apply, since the question before the Commission was "only whether an existing situation should be preserved pending a





determination 'whether respondents' present or planned CATV operations are consistent with the public interest.'" (Id., at 4560). Rather than a cease and desist order, the Commission's order was designed "simply to preserve the situation as it existed at the moment of issuance." Ibid.

Here, the circumstances are manifestly different. Petitioner's existing service and carriage of the disputed signal pre-date promulgation of the Commission's CATV regulations. Because petitioner was in operation before March 17, 1966, under the rules it is conferred "grand-father rights" for the carriage of distant signals, §74.1105. However, under the Commission's order of compliance with its rules, it must halt carriage of same-day duplicating programs -- a substantial curtailment of existing service. Petitioner has asserted that the ordered diminution in service will cause a corresponding decline in subscription and threatens existence of the system. Additionally, petitioner has asserted that the maintenance of the duplicating signals has not and will not cause harm to the economic viability of local television. The CATV rules are premised on findings contrary to these assertions, i.e., that non-duplication protection does not harm the CATV, and that failure to provide it is harmful to the TV station. Petitioner maintains that irrespective of what



regulations the Commission may impose on new or existing service, it may not halt existing service without demonstrating in an evidentiary hearing that the premises for its rules have application to the particular operation. Petitioner argues that this right is constitutionally guaranteed by the due process clause of the Fifth Amendment. Moreover, if Commission licensees are given this right under §312 of the Act, non-licensees have at minimum similar rights and protections. Southwestern does not hold to the contrary; rather it supports petitioner's claim, since the Court there took such pains to exclude a §312 situation on the ground that the case before it halted only an extension of future service, not a curtailment or restriction of existing service. Accordingly, the Supreme Court's affirmance of the Commission's jurisdiction and the right to certain summary proceedings applicable to new service or the freezing of existing service, does not diminish petitioner's right to due process and an evidentiary hearing on the roll back of its service which pre-dates the rules.



CONCLUSION

For the foregoing reasons, petitioner prays that the Court vacate the Commission order herein and that it hold invalid same-day non-duplication, under §74.1103, or in the alternative that it declare that petitioner is entitled to an evidentiary hearing before imposing non-duplication protection.

Respectfully submitted,

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